82-731

OCT 26 1982

ALEXANDER L. STEVAS,
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

EDWARD G. MCNEELY, JR.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Rule 41, Federal Rules of Criminal Procedure, require advance judicial authorization prior to the execution of an arrest warrant at a private residence during nighttime hours?

2.(a) What constitutes exigent circumstances to excuse compliance on the requirements of Title 18, United States Code, Section 3109?

(b) Must judicial approval be sought to dispense with the requirements of Title 18, United States Code, Section 3109 if the exigencies are known in advance?

3.(a) Must the trial court comply with the requirements of Title 28, United States Code, Section 849 and make specific findings before imposing an enhanced sentence under the provisions of that statute?

(b) Is the Court of Appeals excused from making independent findings after their de novo review of an enhanced sentence if the Court upholds the sentence imposed?

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD G. McNEELY, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this cause on December 11, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals on direct appeal is unpublished and is printed as Appendix "A" hereto. The opinion of the Court of Appeals on denial of a Petition for Rehearing is unpublished and is printed as Appendix "B" hereto.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on December 11, 1981. A timely Petition for Rehearing en banc was denied on August 27, 1982, and this Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

JOINDER

Petitioner, EDWARD G. McNEELY, specifically adopts and joins in the

Petition filed by co-defendant at trial, FRANKIE ROBERTS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 41(c), (h), Federal Rules of Criminal Procedure; Title 18, United States Code, Section 3109; Title 21, United States Code, Section 849(b), (e), (f), (h); Rule 32, Federal Rules of Criminal Procedure; and United States Constitution, Fourth Amendment.

STATEMENT OF CASE

On October 23, 1979, at approximately 5:45 a.m., members of the Los Angeles County Sheriff Department's SWAT team, local police officers and agents of the Drug Enforcement Administration mounted a raid on the Culver City home of EDWARD G. McNEELY, Petitioner herein, to serve arrest warrants on Petitioner and three other

individuals.[1] The arrest warrants were issued following an Indictment on October 18, 1979, charging these individuals with various narcotics violations.

The planning for the raid on Petitioner's home had begun some twenty hours prior to the actual entry of the home. However, when the arrest warrants were issued, no authorization for nighttime service was obtained. Nor were any facts presented to the Magistrate to excuse the officers from complying with the knock and notice requirements of Title 18, United States Code, Section 3109.

To effectuate the entry into Petitioner's home, a four-member SWAT team was deployed. At the same time, thirteen other specially trained members

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1/ EDWARD G. McNEELY and Co-defendant, FRANKIE ROBERTS, were found during this raid. No other suspects were present.

of the Los Angeles SWAT team, numerous DEA agents, and assorted local police officers surrounded the house. The SWAT team members, wearing drab-green jumpsuits, knit caps, and combat boots, and carrying AR-1 rifles or shotguns, used a battering ram to break down, first a gate, and then the front door to Petitioner's home. Entry was made, and a "sweep search" and service of the arrest warrants followed.

However, no announcement by the entry team was made prior to its intrusion into Petitioner's home as to its presence and purpose. Further, no demand for entry was made, nor were the occupants given any opportunity to refuse entry before the officers battered down the door.

Following Petitioner'a arrest, an evidentiary hearing was held on whether

the officers were justified in not giving knock and notice. At this hearing, the District Court determined that the Government had met its burden of proof in establishing a justification by showing that the officers were faced with exigent circumstances in making the arrests.

Petitioner was subsequently tried and convicted on two of the four charges against him: conspiracy to distribute heroin and one count of distribution of heroin. He was acquitted on the other two charges, engaging in a continuing criminal enterprise (tried separately) and a second count of distribution of heroin.

On December 5, 1980, Petitioner was sentenced. The Court made a determination that Petitioner was a "dangerous special drug offender" under Title 28, United States Code, Section 849, and it sentenced Petitioner to

twelve and one-half years on each of the two counts with an additional five years on each count under the provision of the Dangerous Special Drug Offender statute for a total of thirty-five years. In addition, he was given a five-year special parole term and fined $50,000.00.

REASONS FOR GRANTING THE WRIT

1. THE BRIGHT LINE DRAWN BY THIS COURT AT THE ENTRANCE TO A PRIVATE RESIDENCE IS TRANSGRESSED BY THE NIGHTTIME EXECUTION OF AN ARREST WARRANT WITHOUT ADVANCE AUTHORIZATION BY A NEUTRAL JUDICIAL OFFICER. YET THE CIRCUMSTANCES UNDER WHICH AN ARREST WARRANT MAY BE SERVED AT NIGHT AT A PRIVATE RESIDENCE HAS NEVER BEEN ADDRESSED BY THIS COURT.

This Court has consistently affirmed the inviolability of those zones of privacy created at the threshhold of an individual's home. See, Stegald v. United States, 101 S.Ct. 1642 (1981); see also: Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980). In the opinion of Justice Stevens writing for

the majority in Payton, physical entry, whether to search or arrest, is the chief evil against which the Fourth Amendment is directed.

The critical import of this court's recent decisions is that there is no distinction for Fourth Amendment purposes between entry into a home in order to search the premises and seize property and entry to effect routine felony arrest. See, Payton v. United States, supra. It would be analomous, therefore, to require advance judicial authorization for nighttime service of search warrants while leaving the determination of when to execute an arrest warrant to the unfettered discretion of law enforcement officers.

Among the questions left open in Payton, is whether entry into a home to execute an arrest warrant is subject to the constraints of Rule 41, Federal Rules

of Criminal Procedure, which prohibits service of search warrants in the nighttime without the approval of the issuing magistrate. (See, Rule 41[c].)

This issue is fairly raised by the facts in this case since arresting officers adopted a strategy to affect McNEELY's arrest in his home which necessitated nighttime entry. Preparation for the invasion of the McNEELY residence in Culver City, California, occupied several weeks. Significantly, all circumstances leading to the supposed necessity of a nighttime execution of the arrest warrant were known to law enforcement agents throughout the planning stage. Thus, it was incumberant upon Government agents to present this information to the issuing magistrate before exceeding the very limited authority to enter a dwelling

in which a suspect lives under the aegis of an arrest warrant. Id. at 1388.

Well before the decision in Payton, this court recognized that the validity of an entry by a federal officer to affect an arrest, even without a warrant, "must be tested by criteria identical with those" which govern entry pursuant to a search warrant. See, Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190 (1958); Sabbath v. United States, 391 U.S. 585, 88 S.Ct. 1755 (1968). The policies underlying Miller and Sabbath which extended the statutory knock and announce requirements of 18 U.S.C. 3109, compel a similar liberal interpretation of Rule 41 to encompass home arrests pursuant to warrants.2/

2/ Rule 41 already controls arrests of persons pursuant to search warrants. Failure to include all federal warrants within the ambit of that rule leaves to the inequitable result that persons

[continued]

2. THE OPINIONS BELOW ARE INCONSISTENT WITH THIS COURT'S DECISIONS IN MILLER V. UNITED STATES AND SABBATH V. UNITED STATES AS FOLLOWED BY THE SIXTH CIRCUIT IN UNITED STATES V. MURRIE. THIS COURT SHOULD SET FORTH A RULE ON WHAT CONSTITUTES SUFFICIENT EXIGENT CIRCUMSTANCES TO DISPENSE WITH REQUIREMENTS OF SECTION 3109 AND REQUIRE THAT SPECIFIC ARTICULABLE FACTS BE SHOWN IN SUPPORT OF THESE EXIGENCIES.

It is beyond cavil that an entry into a dwelling to execute an arrest warrant should be scrutinized under the standards embodied in Title 18, United States Code, Section 3109. Sabbath v. United States, supra; Miller v. United States, supra, United States v. Murrie, 534 F.2d 695, 697 (6th Cir. 1976). Further, although this court has never decided whether Section 3109 is

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2/ [continued]
arrested pursuant to a search warrant are afforded the additional protections of Rule 41 while others, such as Mr. McNEELY, whose homes are invaded for the purpose of arrest are not.

incorporated into the Fourth Amendment, it did leave this issue open in Sabbath, and many federal courts have so held. See, e.g., United States v. Murrie, supra at 698; United States v. Francis, 649 F.2d 251, 257 (6th Cir. 1981).

In the present case, the District Court correctly noted that law enforcement officers failed to comply with the knock and notice requirement of Section 3109 when they battered down the door to Petitioner's home. However, both the District Court and the Court of Appeals held this conduct to be justified by exigent circumstances. According to the Court of Appeals, exigent circumstances existed because: (1) Petitioner was known and believed to have been involved in heroin traffic and had a well-established criminal record; and (2) information possessed by police,

although not too fresh, indicated that Petitioner might be protected by armed guards. (See Appendix "A", Slip Opinion page 3, emphasis added.) Both circumstances were known to the members of the raiding party during the planning for the raid on Petitioner's home.

This Court has not directly addressed the issue of whether the circumstances noted above constitute a sufficient exigency to excuse compliance with the knock and notice requirement of Section 3109. In light of the law's reverance for an individual's right of privacy in his own home codified in Section 3109 (see, Sabbath v. United States, supra; Miller v. United States, supra), the conduct by officers in this case cannot be countenanced on the basis of the circumstances herein.

Standing alone, the fact that a

defendant is extensively involved in narcotics trafficking, or that he has a prior felony conviction, even for a violent crime, is not sufficient per se to amount to an exigenct circumstance. See, United States v. Montano, 613 F.2d 147 (6th Cir. 1980). Otherwise,, no knock and notice would be required prior to any arrest or search at a defendant's home where defendant was suspected of drug trafficking or he possessed a criminal record. Section 3109 would thus be effectively nullified and the intent of Congress in enacting Section 3109 would be abrogated.

Further, although a police officer's belief that announcement would place him or his associates in physical peril may excuse the required knock and notice, any such belief in the present case was clearly unreasonable.

When officers raided Petitioner's

home, they had no idea whether the occupants actually possessed guns. Any "claimed belief" could not be based on speculation or conjecture. There were no facts indicating that Petitioner or other occupants of his home had a propensity of violence [see, e.g., United States v. Garcia-Mendez, 437 F.2d 85 (5th Cir. 1971) (per curiam)], or that anyone of them had ever used a weapon in prior criminal activity [see, e.g., United States v. Scott, 520 F.2d 697, 700-701 (9th Cir. 1975); Rodriguez v. Jones, 473 F.2d 599, 606-607 (5th Cir. 1973); United States v. Harris, 435 F.2d 74, 81-82 (D.C. Cir. 1970)].

It has been held that in the context of serving a search warrant at the apartment of a defendant suspected of drug trafficking, that the mere possession or ownership of a gun did not warrant a finding of exigent

circumstances. See, United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976). Here, as in Fluker, the fact that Petitioner or those around him had been suspected of possessing guns in the past, could not support a reasonable belief that they were armed at the time of the raid on Petitioner's home. This is particularly true when, as in the present case, the information that Petitioner and his associates had previously possessed guns was stale, having been initially obtained years before from informants whose identity and reliability were not made known. Aside from this, on only one occasions was an associate of Petitioner actually observed carrying a weapon.

Surely, such a severe invasion of privacy as occurred in this case--an unannounced nighttime entry into a private home--cannot be based on mere

suspicion or hunch. Such an intrusion should at least require the same "specific and articulable facts" which are required to warrant the least intrusive encounter between police and citizenry: the investigatory stop. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

Since no "specific and articulable facts" that the occupants of Petitioner's home actually possessed guns were known to officers when they made their unannounced intrusion into defendant's home, their failure to give knock and notice pursuant to Section 3109 was not excused.

There is no question that the information regarding the past possession of guns by Petitioner and his associates was known for some time prior to the issuance of the arrest warrants. Therefore, even if the information known

to officers could arguably be deemed sufficiently "specific and articulable," there is no reason why it could not have been made known to the Magistrate so he could made the necessary judgment whether the requirements of Section 3109 should be excused.

One of the purposes of Section 3109 is to actually safeguard officers who might be mistaken, upon an unannounced intrusion into a home, for someone else who has no right to be there. Sabbath v. United States, supra at 589; Miller v. United States, supra at 313, fn. 12. Since the officers' failure to announce their presence and purpose created a greater danger to themselves, and, in light of the interest in protecting the privacy rights of individuals in their homes, the police conduct in this case cannot be excused and the arrest of Petitioner was illegal.

On this basis, Petitioner's conviction must be overturned.

3. THE CIRCUIT COURT OF APPEALS' RULING THAT "FINDINGS" WERE NOT NECESSARY VIOLATES THE CLEAR MANDATE OF TITLE 18, UNITED STATES CODE, SECTION 849, AND THIS COURT MUST SET FORTH THE MINIMUM REQUIREMENTS FOR IMPOSITION AND REVIEW OF SENTENCES UNDER THE DANGEROUS SPECIAL DRUG OFFENDER STATUTE.

On appeal, Petitioner raised several substantial issues with respect to his sentencing as a dangerous special drug offender.[3/] Meaningful review of the

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3/ Summary disposition was made of the following substantial sentencing issues on appeal: (1) Enhanced sentence under Section 849 cannot be imposed unless the maximum term otherwise authorized for the felony charged has also been imposed; (2) trial judge's imposition of sentences under both underlying law prescribing penalties for particular violations and under the enhancement provisions of 849(b) amounted to double punishment; (3) imposition of an enhanced sentence of thirty-five years is impermissible under the provisions of 21 U.S.C. 849; (4) the district court failed to place in the record identification of the information relied upon and its reasons for the sentence imposed as required by Section 849(b); and (5) the appellate court [continued]

District Court's holdings was impossible due to the failure of that court to make the requisite findings. The Court below compounded this error by ruling that it also was absolved from making findings.

The factual predicate for Petitioner's contention that Title 21, United States Code, Section 849 was improperly applied in his case is found in the District Court's explicit

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3/ [continued]
failed to state the reasons for its disposition of the review of the sentence, as required by 21 U.S.C. 849(h).

Another important issue which was overlooked by the Court of Appeals on direct appeal and on its denial for a rehearing is Petitioner's contention that he was not afforded a fair and adequate opportunity to examine the probation officer who prepared the presentence report in order to rebut information contained therein, in violation of his right to due process of law. (See, Rule 32, Federal Rules of Criminal Procedure; United States v. Stewart, 531 F.2d 326, 332 [6th Cir. 1976].)

statement that it was imposing a sentence of twelve and one-half years out of a maximum of fifteen years for each of the counts of which Petitioner was convicted, plus five additional years for each count as enhancements under Section 849 and its failure to make findings contrary to the mandates of Section 849. Section 849(f) requires a finding that a defendant is "dangerous," i.e., that confinement for a period longer than that provided by the underlying felonious violation is necessary. Thus, the court's representation that it was imposing, or that it would impose, less than the maximum term for each of the underlying offenses is incompatable with a finding of dangerousness within the meaning of the statute. Further, neither the District Court nor the appellate court made findings of fact to support its imposition of an enhancement under

Section 849.

A related problem was examined by the Second Circuit Court of Appeals in United States v. DiFrancesco, 658 F.2d 33 (2nd Cir. 1981), in the context of sentencing under Title 18, United States Code, Section 3575. In DiFrancesco, the defendant was convicted in one trial of violating 18 U.S.C. 1962 (RICO) for conducting an arson-for-hire business in Rochester, New York. In a second trial, he was convicted of various crimes surrounding the bombing of the Federal Building in Rochester. He was sentenced to a total of nine years for his involvement in the bombing. Subsequently, he was sentenced as a dangerous special offender to two concurrent ten years terms of imprisonment for his RICO violations. These terms were to be served concurrently with the nine years imposed

for the bombing conviction.

In effect, DiFrancesco received only a one year prison term for his involvement in the arson ring, even though the maximum term under that statute is twenty years for each count. On the Government's appeal from this sentence, the Court of Appeals held that the defendant must be resentenced because the trial court's finding of "dangerous," and the resulting sentence of less than the maximum provided for the "trigger" felony offense were inconsistent. Id. at 38.[4/]

Although the aggregate sentence imposed in the instant case exceeds the

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4/ This decision followed a remand from the United States Supreme Court in a case by the same name (at 449 U.S. 117), in which this Court upheld the authority granted the Government by 18 U.S.C. 3576 to appeal sentences imposed under the special dangerous offender statute from attacks on double jeopardy grounds. See, United States v. DiFrancesco, 604 F.2d 769 (2nd Cir. 1979).

maximum of fifteen years prescribed by the underlying offenses, the inconsistency inherent in the District Court's sentencing pronouncements invites reversal on the basis of reasoning similar to that employed in DiFrancesco. To reiterate: the imposition of less than the maximum penalty for each of the underlying felony violations is irreconcilable with the finding that defendant was "dangerous," as required by Section 849(b) and (f).

This is compounded by the fact that the finding of dangerousness in this case was not adequately reflected in the record. Instead of the reasoned findings and detailed information mandated by this statute, the District Court substituted a more conclusory statement to the effect that Petitioner McNEELY had engaged in narcotics activity on a continuous basis.

Upon review of the enhanced

sentence, the Court of Appeals summarily disposed of the substantial issues surrounding Petitioner's sentencing despite the patent insufficiency of the record findings. It compounded this error by failing to make particularized findings itself as mandated by Section 849(h).

Upon considering McNEELY's Petition for Rehearing, the same panel which heard the appeal acknowledged that it would "indeed be desireable and perhaps mandatory to make very particularized findings" but, only "if the appellate court exercised the power conferred upon it to impose or direct the imposition of a sentence which differs from that imposed by the district court . . . " (Appendix "B,"Order that the Petition for Rehearing be Denied, pages 1, 2) No authority is offered for this abrogation of the requirement for specific findings.

This is because no such authority exists. The language of the statute is clear that "review" in and of itself triggers the requirement for such findings. Thus, Petitioner herein has been deprived at each judicial level of the findings which are integral elements of due process afforded by this statute.

The failure to impose maximum sentences for each of the underlying felonies also impinged upon Petitioner's due process rights as related to the constitutional guarantees against double jeopardy and multiple punishment. In light of the District Court's findings that a period of confinement less than the maximum term constituted a satisfactory penalty for each of Petitioner's felony violations, it follows that the sentence enhancements of five years respectively were imposed for other crimes alleged in the notice filed

by the United States Attorney pursuant to 849(a) and not those actually charged.

These crimes include, for instance, a 1966 conviction, plus an allegation that McNEELY was engaged in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. Plainly, it was impermissible to use the enhancement procedure under Section 849 to exact a penalty for each of these different crimes. As for the 1966 offense, the increased sentence amounted to multiple punishment since Mr. McNEELY had already served two and one-half to three years on that conviction.[5/]

5/ Apparently, a significant factor in the court's imposition of increased sentences was its view that Mr. McNEELY had failed to serve enough time on previous convictions--particularly, a prior heroin conviction for which he had received a straight probationary sentence characterized as a "gross miscarriage of justice" by the district court.

Moreover, to the extent that Mr. McNEELY's sentence was increased to compensate for his acquittal of the Section 848 charge at a trial severed from the one which is the subject of this Petition, the sentencing court's discretion was abused.

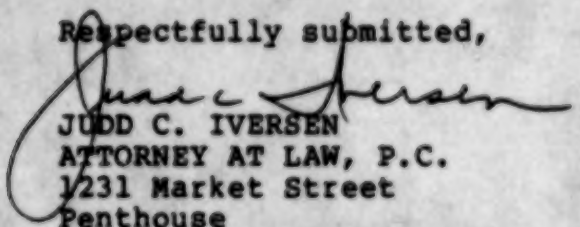
In light of this liteny of errors committed in connection with enhanced sentencing under Section 849--inconsistent sentencing strategies coupled with inadequately detailed findings, which in turn precluded full appellate review--this Court should grant Mr. McNEELY's Petition in order to clarify proper procedures under Section 849 and forclose future ideosyncratic applications of that statute in degradation of defendants' constitutional rights.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

DATED: October 25, 1982.

Respectfully submitted,



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